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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on July 14, 1955.

OPINIONS BELOW

The United States District Court for the Eastern District of Virginia rendered no opinion. The opinion of the Court of Appeals (App. 22-24) is reported at 224 F. 2d 443.

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1955 (App. 24-25). On October 7, 1955, the time for filing a petition for a

writ of certiorari was extended by the Chief Justice to and including December 11, 1955 (App. 25). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the expiration of the two-year limitation period of Section 16 (3) of the Interstate Commerce Act, while not barring suits by common carriers against the United States, nonetheless precluded the granting of the Government's motion for referral to the Interstate Commerce Commission for a determination as to the reasonableness of the tariff rates demanded by the carriers, thus preventing the Government from establishing the unreasonableness of those tariff rates as a complete defense to the suits.

2. Whether a challenge to the reasonableness of a tariff rate, as applied in the prevailing circumstances, presents an administrative question calling for resolution by the Interstate Commerce Commission.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U. S. C. 1 *et seq.* are set out in the Appendix, *infra*, pp. 19-21.

STATEMENT

This action was brought against the United States by respondent Chesapeake & Ohio Railway Company under the Tucker Act, 24 Stat. 505, as

amended, 28 U. S. C. 1346 (a) (2), to recover sums purportedly owing it in connection with the transportation of certain Government property (R. 2).¹ The pertinent facts are undisputed and may be summarized as follows:²

Between December 10, 1941, and January 31, 1942, the United States shipped from Pontiac, Michigan, under Government bills of lading, fifty carloads of chassis, seat cabs and bodies (R. 3-6, 24-25). The freight was consigned to China Defense Supplies Inc.³ at Newport News, Virginia (R. 3-6, 24-25). Notations on each of the bills of lading indicated that the shipments were authorized by the War Department and that the goods involved were the military property of the United States, were moving for a military use, and were intended for exportation to the Republic of China pursuant to the provisions of the Lend Lease Act of March 11, 1941, 55 Stat. 31, 22 U. S. C. 411 *et seq.* (R. 25; App. 26-27. It was the bona fide intent of the Government that the

¹ "R" refers to volume I of the certified record filed in this Court.

² In part, these undisputed facts appear in the findings of the same district judge in an earlier companion action involving shipments made under almost identical circumstances. See pp. 6-9, *infra*. These findings, which by informal agreement between the parties were referred to in the court below, are set forth in the Appendix, pp. 26-32, *infra*.

³ China Defense Supplies was an American corporation which acted as the representative of the Chinese government for the acquisition of military supplies from the United States under the Lend Lease Act (App. 27).

property be forwarded from the port of Newport News, in ocean vessels, to the Republic of China via the port of Rangoon, Burma (R. 25).

Each of the bills of lading also contained symbols indicating that releases had been obtained on the covered shipments (App. 27). The Chief of Transportation of the War Department, in cooperation with the Maritime Commission, was administering a system for the supervision of export shipments of military supplies to facilitate their movement, the primary element of the system being the coordination of domestic transportation to coastal ports with the overseas transportation from such ports (App. 2).⁴

⁴ Pursuant to the Act of June 6, 1941, c. 174, 55 Stat. 242, as implemented by Executive Order 8771, June 6, 1941 (6 F. R. 2759), and the Act of July 14, 1941, c. 297, 55 Stat. 591, the Maritime Commission had requisitioned foreign merchant vessels in American waters and chartered all American vessels for operation consistent with the needs of national defense. Priorities were issued with respect to the loading, fueling and repairing of vessels on the basis of those needs. Subsequently, the Office of Defense Transportation was created to direct and co-ordinate transportation activities with a view towards maximum utilization of existing facilities. Executive Order 8989, December 18, 1941 (6 F. R. 6725). On February 7, 1942, by Executive Order 9054 (7 F. R. 837), the War Shipping Administration was created and the functions of the Maritime Commission in respect to the operation, charter, and requisition of merchant vessels were transferred to it. The Executive Order specifically provided that the vessels under WSA control were to constitute a pool to be allocated by the Administrator for use by the Army, Navy, other federal agencies, and the Governments of the Allied Nations in compliance with strategic military requirements.

The transportation officers of the War Department were not permitted to issue bills of lading without first obtaining a release covering the particular shipment, such release being issued with the view of limiting the tonnage scheduled to a particular port to the capacity of that port for prompt shipment (App. 27-28). The reference in each bill of lading to a release indicated that arrangements had been made prior to shipment for the coordinated movement of the property from Pontiac, Michigan, to Newport News and for export thereafter from Newport News to China, via Rangoon (App. 28).

Upon the arrival of the property covered by the bills of lading at Newport News, delivery was made to the consignee and the goods were unloaded onto a Government-controlled pier (R. 25). On March 8, 1942, the port of Rangoon fell to the Japanese military forces (R. 25). This event cut off all available routes for the transportation of goods between the United States and the intended ultimate destination in the Republic of China (App. 30). As a result, the intended exportation could not be effectuated and the carloads were reshipped to storage centers maintained by the War Department (R. 16-17, 25).

The carrier submitted bills for the line-haul transportation from Pontiac to Newport News based upon the established *domestic* rate published in Central Freight Association, Freight Tariff No. 490-A, Agent B. T. Jones' I. C. C. No.

2767 (R. 25). These bills were paid. However, upon the subsequent audit of the payment vouchers by the General Accounting Office, the charges were recomputed at the lower *export* rate published in Central Freight Association, Freight Tariff No. 218-M, Agent B. T. Jones' I. C. C. No. 3422 (R. 25). The Government thereafter recovered the difference between the two sums by deducting it from amounts due the carrier in connection with other transportation services performed by it (R. 25-26).⁵

On March 10, 1952, respondent brought this action in the District Court to recover the amount of the deduction (R. 2). By stipulation, the proceedings were held in abeyance pending final judgment in Civil Action 1268, instituted by respondent on December 29, 1950 (R. 21). That action involved twenty-four carloads of similar automotive equipment shipped in December 1941 and January 1942 from Pontiac to Newport News for exportation to China via Rangoon (App. 26, 30-31). Like the shipments here involved, their intended exportation was frustrated by the Japanese occupation of Rangoon, whereupon the goods were reshipped to storage centers maintained by the War Department (App. 30). As here, respondent charged and collected the domestic rate and, after administrative set-off by the General

⁵ This procedure is expressly sanctioned by Section 322 of the Transportation Act of 1940, c. 722, Title III, 54 Stat. 898, 955, 49 U. S. C. 66.

Accounting Office based upon the application of the export rate, brought suit (App. 30-31).

At the trial in Civil Action 1268, respondent advanced the theory that the export rate applied solely in circumstances where exportation actually took place from the consignment port. In support of this theory, it relied exclusively on the literal language of Item No. 23030 of Tariff No. 218-M, which read:

APPLICATION OF EXPORT RATES TO NORTH ATLANTIC SEABOARD PORTS OF EXPORT

The rates named in this tariff, or as same may be amended, and designated as "Export Rates" will apply only on traffic which does not leave the possession of the carrier, delivered by the Atlantic Port Terminal carriers direct to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of export rates, and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply, which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation is given.

The Government's position in No. 1268 was that, whether this Item 23030 rendered the domestic rate applicable as a matter of tariff construction or not, the Interstate Commerce Com-

mission had held in virtually identical circumstances that it would be unreasonable to apply the domestic rate, and that these decisions should be followed. The District Court held, however, that, since there was no showing of actual exportation, the domestic rate was applicable and that the reasonableness of that rate was to be conclusively presumed (App. 32-33). Judgment was accordingly entered for respondent.

On appeal of that case, the Government renewed the position it took in the District Court and urged, in the alternative, that if the lower court had been in doubt as to the applicability of the Commission rulings relied upon by the Government, it should have stayed the proceeding *sua sponte* and referred the question of reasonableness to that administrative body for a determination in the nature of a declaratory judgment. The Court of Appeals rejected both contentions and affirmed the judgment; *United States v. Chesapeake & Ohio Railway Company*, 215 F. 2d 213.* Respecting the application of the tariffs, the court read the relevant Commission decisions as governing solely those situations where, subsequent to the frustration of the intended exportation, the shipper made an effort to export the goods elsewhere (215 F. 2d at 216; App., *infra*, pp. 37-38). As to the matter of referral to the Commission "for an adjudication of the

* For the convenience of the Court, the Court of Appeals' opinion is set forth in the Appendix, pp. 33-39, *infra*.

reasonableness of the domestic rate as applied to these shipments under the circumstances here appearing" (215 F. 2d at 216; App., *infra*, p. 38), the court held that the Government's failure to request the District Court to take such action provided a "sufficient answer" (*ibid.*). It went on to suggest additionally that, since the Government's time for instituting an independent reparations proceeding before the Commission had run, the District Court would have abused its discretion had it stayed the proceedings to enable the question of reasonableness to be presented to the Commission (App., *infra*, p. 39).

Following that decision of the Court of Appeals, a pre-trial conference was held in the instant case (R. 23). At that conference, the Government moved to refer to the Interstate Commerce Commission the question whether "the domestic tariff rate involved in this proceeding is reasonable if it should be determined that the shipment involved, or any part thereof, was subsequently exported" (R. 23).⁷ In its pre-trial order, the court denied the motion and ruled that the issue to be litigated was whether the ultimate exportation of the shipments would render the export rate applicable (R. 23).

⁷ By virtue of the stipulation entered into before the trial in Civil Action 1268 (see p. 6, *supra*), the Government was foreclosed from challenging the applicability of the domestic rate to that portion of the shipments, if any, which was not eventually exported.

On February 10, 1955, the District Court entered an order rejecting an offer of proof (Exhibit 1, on file with the Court) that a substantial majority of the shipments had been eventually exported and awarding judgment to respondent in the amount of \$9,571.36 (R. 29). On July 14, 1955, the Court of Appeals affirmed in a *per curiam* opinion (App. 22-24). In response to the Government's contention that, at the very least, the Commission decisions relied upon established the unreasonableness of applying the domestic rate to those shipments encompassed by the offer of proof, the court held that the fact of subsequent exportation made no difference (App. 23). In relation to the motion for referral to the Commission, the court stated (App. 23-24):

[T]he motion was properly denied. The question was not the reasonableness of rates, which everyone conceded to be reasonable, but which rate was applicable to the shipment under the circumstances of the case, a question which the court was competent to decide. There were before the court no such administrative questions as were involved in *United States v. Kansas City Sou. R. Co.*, 8 Cir. 217 F. 2d 763, upon which appellant relies. Furthermore, as we pointed out in the prior case, it would not have been a reasonable exercise of discretion to stay proceedings pending action by the Commission where all parties before the court were barred by limitations from asking such action. The court has power

to stay proceedings before it pending action by the Commission, but not to refer to the Commission proceedings which the Commission is without power to entertain.

REASONS FOR GRANTING THE WRIT

This case presents the recurring question as to the appropriate procedure to be followed by courts in cases involving an attack upon the reasonableness of the application of a particular tariff rate. In upholding the District Court's denial of the Government's motion seeking referral to the Interstate Commerce Commission for a determination of the reasonableness of the domestic rate as applied to the shipments in issue here, the court below held (1) that Section 16 (3) of the Interstate Commerce Act (App., *infra*, pp. 20-21), requiring independent reparations proceedings to be instituted before the Commission within two years of the rendition of the transportation services, precluded referral; and (2) that in any event the issue which the Government sought to refer was one to be determined judicially rather than administratively. This holding conflicts with decisions of this Court and of other courts of appeals in an important area of judicial administration and, additionally, is at variance with the understanding and practice of the Commission as manifested by decisions of that agency. It therefore should be reviewed by this Court.

1. The holding below that referral of the issue of reasonableness to the Interstate Commerce Commission was precluded by the two-year limitation provision of Section 16 (3) presents the same issue as is raised in *United States v. Western Pacific R. Co.*, in which a petition for a writ of certiorari to the Court of Claims is being filed concurrently. Here, as in *Western Pacific*, the court below apparently believed that the expiration of the two-year limitation period with respect to independent reparation proceedings rendered inapplicable the well-established principle of judicial-administrative comity—a principle which requires that, when in the course of judicial proceedings it develops that a question appropriate for Interstate Commerce Commission determination is involved, the court stay its hand until the Commission has had the opportunity to pass upon it. See e. g., *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 433; *Thompson v. Texas Mexican R. Co.*, 328 U. S. 134, 147; *Smith v. Hoboken R. Co.*, 328 U. S. 123, 133.^{*} As is shown in the petition for a writ of certiorari in the *Western Pacific* case (pp. 9–11), the view of the court below that referral was precluded by the limitation provision in question is in

^{*} See, also, *United States v. Kansas City Southern Ry. Co.*, 217 F. 2d 763, 769, 777 (C. A. 8); *Northern Pacific Ry. Co. v. United States*, 213 F. 2d 366, 369 (C. A. 8); *S. S. W. Inc. v. Air Transport Ass'n of America*, 191 F. 2d 658, 664 (C. A. D. C.); *City of New Orleans v. Texas & N. O. R. Co.*, 195 F. 2d 882, 887 (C. A. 5).

square conflict with the decision of the Eighth Circuit in *United States v. Kansas City Southern Ry. Co.*, 217 F. 2d 763 (C. A. 8). For the reasons set forth in the *Western Pacific* petition (pp. 11-19), to which the Court is respectfully referred, we submit that the holding below is erroneous and that the *Kansas City Southern* decision is correct.⁹

2. Equally unsound, in our view, is the further holding below that there were no questions before the District Court calling for resolution by the Interstate Commerce Commission under the "primary jurisdiction" rule, first enunciated by this Court in *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. Underlying this holding is the court's statement that the reasonableness of the domestic tariff rate was not in issue and that the sole question was whether that rate, or the lower export rate, was applicable (App. 23). By this, the court below apparently meant that the Government did not assert that the domestic rate was unreasonable *per se*, i. e., that it could not be lawfully applied in any circumstances to shipments of automotive parts moving between

⁹ In the *Kansas City Southern* and *Western Pacific* cases, the court made the same assumption that was made by the court below, viz, that the limitation provisions of Section 16 of the Interstate Commerce Act apply to Commission proceedings instituted by the Government. As pointed out in the *Western Pacific* petition (pp. 16-18), while we believe that assumption to be incorrect, for present purposes it is unnecessary to challenge it.

Pontiac and Newport News. For plainly no concession was made that the domestic rate was reasonable as applied to the shipments here involved. To the contrary, as is borne out by the motion for referral to the Commission (R. 23), the Government's uniform position below was this: it is unreasonable to charge the domestic rate on traffic which is destined for exportation at the time of rail movement, when the freight is not in fact exported from the consignment port solely by reason of wartime developments occurring subsequent to the arrival of the goods at the port.¹⁰

Stated otherwise, while the ultimate disposition of the litigation may have been dependent upon a determination respecting which of two rates was to be applied, as the issue was framed in the District Court this determination in turn hinged upon considerations of reasonableness rather than

¹⁰ It should be observed that the Court of Appeals' opinion in the earlier case (*United States v. Chesapeake & Ohio Ry. Co.*, 215 F. 2d 213, App., *infra*, pp. 33-39) dispels any doubt that the Court of Appeals correctly understood the Government's position. The court there stated (215 F. 2d at 216, App. 38): "The government contends that the court below should have stayed the proceedings and referred the case to the Interstate Commerce Commission for an adjudication of the reasonableness of the domestic rate as applied to these shipments * * *." [Emphasis supplied.] It might also be noted that, while on the earlier appeal the Government suggested, without pressing the point, that as a matter of tariff construction the export rate was applicable, in this case it expressly disclaimed any reliance whatever upon the terms of the export tariff itself.

upon a construction of the terms of the respective tariffs. And, contrary to the seeming belief of the court below, whether examined from the standpoint of the prohibition against unreasonable charges contained in Section 1 (5) of the Interstate Commerce Act (App., *infra*, p. 19), or of the prohibition against unreasonable practices set forth in Section 1 (6) (App., *infra*, pp. 19-20), the matter is one within the exclusive province of the Commission. As this Court observed in *Great Northern Ry Co. v. Merchants Elevator Co.*, 259 U. S. 285, 291, "[w]henever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." Cf. *Pennsylvania R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 196; *Mitchell Coal Co. v. Pennsylvania R. R. Co.*, 230 U. S. 247, 255-261; *Thompson v. Texas Mexican R. Co.*, 328 U. S. 134, 147; *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 432.

That questions of reasonableness such as the one presented here necessitate Commission resolution has been recognized by several lower courts. In *Reconstruction Finance Corporation v. Spokane, P. & S. Ry. Co.*, 170 F. 2d 96 (C. A. 9), for example, the issue was which of two tariff rates applied to certain shipments of tax-free Government alcohol. While the shipper did not contend that the rate charged by the carrier was unreasonable *per se*, its expert witnesses sug-

gested that, because of the character of the shipments, the carrier could not collect that rate on their movement without contravening the reasonableness provisions of the governing Act. The Ninth Circuit refused to consider this suggestion, holding on the authority of *Pennsylvania R. R. Co. v. International Coal Mining Co.*, *supra*, that it must be addressed to the Commission (170 F. 2d at 98). See, also, to the same effect *Union Pacific Ry. Co. v. United States*, 125 C. Cls. 390, 394, discussed in the petition in *United States v. Western Pacific Ry. Co.* at pp. 12-13.

There certainly can be no doubt regarding the position of the Commission itself. On at least five occasions since the beginning of World War II that body has been called upon by shippers to determine whether the domestic rate may be applied in situations where exportation from the consignment port has not taken place, or some other condition precedent set forth in the established export tariff had not been met, because of intervening war conditions. *C. B. Fox Co. v. Gulf, Mobile & Ohio Ry. Co.*, 246 I. C. C. 561; *River Petroleum Corp. v. Yazoo & M. V. R. Co.*, 258 I. C. C. 1; *Mid-Continent Petroleum Corp. v. Illinois Central R. Co.*, 258 I. C. C. 422; *Products-From-Sweden, Inc. v. Lehigh Valley R. Co.*, 263 I. C. C. 760; *General Carloading Co., Inc. v. Baltimore & Ohio R. Co.*, 266 I. C. C. 243. And, in each instance, it held that in the circumstances the application of the domestic rate was unjust and

unreasonable and, on that holding, awarded reparations. As the Commission put it in *Products-From-Sweden, Inc. v. Lehigh Valley R. Co.*, *supra*, citing its earlier *Fox* and *Mid-Continent Petroleum* decisions (263 I. C. C. at 763):

Complainant made the shipments under consideration in good faith, with the understanding that the export rate would be protected. Exportation of the shipments through the port of New York, as originally intended, was prevented by extraordinary conditions caused by the war, conditions clearly beyond the control of the parties. Moreover, the subsequently published tariff provisions, which permit the application of export rates to similar shipments, are entitled to consideration, although they may not be applied retroactively. In view of these circumstances, we are of the opinion that *application of the domestic rates on these shipments would be unreasonable*. [Emphasis supplied.] ¹¹

¹¹ As heretofore noted, we urged below that, in respect to their operative facts, these decisions are indistinguishable from the instant case and, further, that where the Commission has already ruled on the reasonableness of a rate in given circumstances a court need not call upon it to reiterate the ruling. Cf. *Phillips v. Grand Trunk Ry. Co.*, 236 U. S. 662, 665. But, while we think that the court below misread the Commission holdings, we nevertheless do not ask this Court to pass upon their meaning. Instead, our point in this Court is that, whether it was right or wrong in its belief that the Commission had not resolved the precise issue raised here in the shipper's favor, the court below should not have undertaken itself to resolve it. We emphasize again that, what-

CONCLUSION

For the reasons above stated and those set forth in the petition in *United States v. Western Pacific R. Co.*, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

WARREN E. BURGER,
Assistant Attorney General.

MELVIN RICHTER,
ALAN S. ROSENTHAL,
Attorneys.

DECEMBER 1955.

ever else may be said of the Commission decisions, they treat, correctly we think, the question of which rate applies to "frustrated" export traffic as being ~~one involving~~ considerations of reasonableness alone.

APPENDIX A

The relevant provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 *et seq.*, are as follows:

Section 1 (5) [49 U. S. C. 1 (5)]:

(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * * *

Section 1 (6) [49 U. S. C. 1 (6)]:

It is made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess bag-

gage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Section 16 (3) [49 U. S. C. 16 (3)]:

(a) All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.

(b) All complaints against carriers subject to this part for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).

(c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this part within two years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before expiration of the two-year period of limitation in subdivision (b) or of the two-year period of limitation in subdivision (c) a carrier subject to this part begins action under subdivision (a) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

* * * * *

APPENDIX B

I. OPINION OF THE COURT OF APPEALS

United States Court of Appeals for the Fourth
Circuit

No. 6998.

UNITED STATES OF AMERICA, APPELLANT

versus

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, AT
RICHMOND

(Argued June 15, 1955. Decided July 14, 1955)

Before PARKER, *Chief Judge*, and SOPER and
DOBIE, *Circuit Judges*

Alan S. Rosenthal, Attorney, Department of Justice (Warren E. Burger, Assistant Attorney General; L. S. Parsons, Jr., U. S. Attorney, and Melvin Richter, Attorney, Department of Justice, on brief), for Appellant, and Meade T. Spicer, Jr. (Walter Leake on brief), for Appellee

PER CURIAM:

This is another case, like *United States v. Chesapeake & Ohio R. Co.*, 4 Cir. 215 F. 2d 213,

where the only question involved is whether the export or the domestic freight rate is properly applicable to a shipment where there was an intention to export at the point of origin but where this intention was abandoned when the shipment reached the port from which exportation was to be made, so that what started out as a shipment for export was converted by the shipper into a domestic shipment. The only difference between this and the former case is that here the goods, after being held at Newport News for more than three months, were shipped by rail to storage centers in Pennsylvania and New Jersey, and, after being held there for more than a year, were shipped across the continent to Wilmington, California, whence they were exported to Calcutta, India. It appears; here, just as clearly as in the former case, that the intention to export to China was abandoned and that the movement which began at Pontiac, Michigan, as an export was converted by the shipper into a domestic shipment. The case, we think, is clearly governed by our former decision and nothing need be added to what was there said.

Appellant insists that there is a difference with respect to its motion to stay proceedings and refer the case to the Interstate Commerce Commission, in that that motion was made in the court below in this case but not in the former one. It is clear, however, that the motion was properly denied. The question was not the reasonableness of rates, which everyone conceded to be reasonable, but which rate was applicable to the shipment under the circumstances of the case, a question which the court was competent to decide.

There were before the court no such administrative questions as were involved in *United States v. Kansas City Sou. R. Co.*, 8 Cir. 217 F. 2d 763, upon which appellant relies. Furthermore, as we pointed out in the prior case, it would not have been a reasonable exercise of discretion to stay proceedings pending action by the Commission where all parties before the court were barred by limitations from asking such action. The court has power to stay proceedings before it pending action by the Commission, but not to refer to the Commission proceedings which the Commission is without power to entertain.

2. JUDGMENT

United States Court of Appeals for the Fourth
Circuit

No. 6998

UNITED STATES OF AMERICA, APPELLANT

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Filed and entered July 14, 1955.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judg-

ment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

(S) JOHN J. PARKER,
Chief Judge, Fourth Circuit.

(S) MORRIS A. SOPER,
United States Circuit Judge.

(S). ARMISTEAD M. DOBIE,
United States Circuit Judge.

3. ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Supreme Court of the United States

No. —, October Term, 1955

UNITED STATES OF AMERICA, PETITIONER
v.

CHESAPEAKE & OHIO RAILWAY COMPANY.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 11, 1955.

(S) EARL WARREN,
Chief Justice of the United States.

Dated this 7th day of October 1955.

4. FINDINGS OF FACT AND CONCLUSIONS OF LAW, IN
CIVIL ACTION No. 1268, *Chesapeake & Ohio
Ry Co. v. United States*

FINDINGS OF FACT

1. The plaintiff is a corporation organized and existing under the laws of the State of Virginia and is a common carrier by railroad, operating in inter-state commerce, and connects with, and performs through services in conjunction with, other such common carriers by railroad who participated in the through transportation services involved in this case.

2. Thirty (30) carloads of chassis, seat cabs, and bodies were shipped from the Yellow Truck and Coach Manufacturing Company, Pontiac, Michigan, consigned to China Defense Supplies, Inc., Chesapeake and Ohio Terminal, Newport News, Virginia, a North Atlantic Seaboard Port of Export, between December 10, 1941, and January 9, 1942, inclusive, on the following numbered Government Bills of Lading on which transportation charges have been paid by the United States in the amounts shown:

Government bill of lading	Date of shipment	Transportation date of arrival at Newport News	Charges paid
WQ-4495005.....	Dec. 10, 1941	Dec. 18, 1941	\$1,979.62
WQ-4498594.....	Dec. 22, 1941	Dec. 27, 1941	1,939.77
WQ-4498596.....	Dec. 22, 1941	Dec. 27, 1941	1,182.23
WQ-4501687.....	Jan. 9, 1942	Jan. 12, 1942	799.41
Total charges paid.....			5,901.03

3. These Government Bills of Lading contain the words "Military D. A." and the words "For

Export D. A." and further show that the shipping cases were marked with the initials "C. D. S." (an abbreviation for China Defense Supplies, Inc.), followed by the word "RANGOON." As indicated by these annotations on the Bills of Lading, these shipments were authorized by the War Department; the property shipped was military property of the United States, moving for a military use, and intended for export pursuant to the provisions of the Lend-Lease Act of March 11, 1941 (22 U. S. C. 411 et seq.), for use by the Republic of China and it was intended by the Government that the property would be forwarded from the port of Newport News, Virginia, in ocean vessels to the Republic of China via the port of Rangoon, Burma, China Defense Supplies, Inc., was an American corporation organized, controlled and operated by the Government of China. It acted as the representative of the Government of China for the acquisition of military supplies from the United States pursuant to the Lend-Lease Act.

4. Three of these Government Bills of Lading contained the symbol "Rel. No. 50092, dated 11-26-41"; the fourth Bill of Lading contained the symbol "Rel. No. 50649, AM, dated 12-20-41." At the time the releases referred to in these Bills of Lading were issued, the Chief of Transportation of the War Department, in cooperation with the Maritime Commission, was administering a system for the supervision of export shipments of military supplies to facilitate their movement, through coordination of domestic transportation to ports and overseas transportation from such ports. Transportation officers of the War Department were not permitted to issue bills of

lading without first obtaining releases covering particular shipments, and such releases were issued so as to limit the tonnage scheduled to a particular port at a given time to the capacity of that port for prompt shipment. Pursuant to the Act of June 6, 1941 (55 Stat. 242), Executive Order No. 8771, dated June 6, 1941 (6 F. R. 2759), and the Act of July 14, 1941 (55 Stat. 591), the Maritime Commission requisitioned the title, use, or possession of foreign Merchant vessels in American waters and operated such vessels, either directly or by agent; chartered all American vessels and operated them or caused them to be operated with primary consideration to the needs of national defense; and granted priorities with respect to loading, fueling, and repairing of American vessels in the interest of the transportation of materials requested by defense agencies and materials deemed essential to the defense of the United States.

5. The references on these Bills of Lading to such releases indicate that arrangements had been made, pursuant to War Department Q. M. C. Circular No. 182, dated August 28, 1941, under the supervision of the Chief of Transportation of the War Department for the co-ordinated movement of this property from point of origin to the port of Newport News, Virginia, and for export there to Rangoon in ocean vessels.

6. By Executive Order No. 8989, dated December 18, 1941 (6 F. R. 6725), the President established the Office of Defense Transportation with the function of co-ordinating the transportation policies and activities of Federal agencies and private transportation groups in effecting such

adjustments in the domestic transportation systems of the Nation as the successful prosecution of the war might require, and directed the Office of Defense Transportation, in cooperation with the United States Maritime Commission and other appropriate agencies, to co-ordinate domestic traffic movements with ocean shipping in order to avoid terminal congestion at port areas and to maintain a maximum flow of traffic.

7. By Executive Order No. 9054, dated February 7, 1942 (7 F. R. 837), the President established the War Shipping Administration; transferred to it the functions of the Maritime Commission set forth in Paragraph 4 above; vested in it the functions of controlling the operation, charter, requisition, and use of all ocean vessels under the flag and control of the United States except combatant vessels and inter-coastal and inland transportation; the allocation of such vessels for use by the Army, Navy, other Federal Departments and agencies, and the Governments of the United Nations; and of collaborating with agencies of the Government which performed wartime functions connected with transportation overseas, in order to secure the most effective utilization of shipping in the prosecution of the war. This Executive Order provided that vessels under the control of the War Shipping Administration should constitute a pool to be allocated by the Administrator of the War Shipping Administration for use by the Army, Navy, other Federal agencies, and the Governments of the United Nations in compliance with strategic military requirements.

8. Upon the arrival of the property covered by these Government Bills of Lading at Newport News, Virginia, delivery thereof was made to the consignee, who caused the property to be unloaded from the railroad cars in which the property was transported. The property received in six of the cars covered by the said Government Bills of Lading was thereafter exported as intended at various times prior to March 8, 1942, but the property received in twenty-four of the said thirty cars was still on hand at Newport News, Virginia, on March 8, 1942, on which date the port of Rangoon, Burma, was captured by the Japanese. On that date, all available routes whereby the property in question could at that time be forwarded so as to reach the intended destination in China were cut off by the Japanese. Consequently, the property then on hand at Newport News, Virginia, was subsequently ordered loaded and shipped to storage centers maintained by the War Department at New Cumberland, Pennsylvania, or at Bloomfield, New Jersey. This property was not exported and there is no proof to show that any further effort was made to export it.

9. The plaintiff, as the delivering carrier at Newport News, Virginia, rendered bills for the line-haul transportation charges from Pontiac, Michigan, to Newport News, Virginia, and for the unloading and loading services performed at Newport News, Virginia, and was paid initially by an Army disbursing officer in substantially the amounts billed. There is no dispute with respect to the unloading and loading charges included in the said payments to the Plaintiff. The

line-haul transportation charges so paid to the plaintiff were computed by the use of the established domestic rates published in Central Freight Tariff No. 490-A, Agent B. T. Jones' I. C. C. No. 2767, for the property shipped in the twenty-four (24) cars that was not exported as intended, and at the established export rates published in Central Freight Association Freight Tariff No. 218-M, Agent B. T. Jones' I. C. C. No. 3432 for the property shipped in the six cars that was actually exported as intended. Upon audit of the payment vouchers the defendant thereafter computed the charges on all of the property shipped on the aforesaid Government Bills of Lading at the established export rates published in Tariff No. 218-M, and recovered the differences between the two sums by deductions from amounts otherwise due the plaintiff for other and different transportation services performed for the defendant.

10. It is agreed by the parties that the plaintiff has been fully paid for the services performed in connection with the portion of the property shipped that was actually exported from Newport News, Virginia.

11. If actual exportation of the articles shipped be not required as a condition upon which the export freight rates may be applied, the plaintiff has been paid in full for the transportation services performed.

12: It is agreed by the parties that if the domestic freight rates between Pontiac, Michigan, and Newport News, Virginia, are properly applicable to the portions of the property not exported, the aggregate amount of the transportation

charges now unpaid and owing by the defendant to the plaintiff is \$2,671.43.

CONCLUSIONS OF LAW

1. At the time the shipments involved herein were made, the Interstate Commerce Commission had determined certain published rates for the transportation of the articles involved, from Pontiac, Michigan, to Newport News, Virginia, to be reasonable in amount, commonly known as "domestic rates." By reason of such action of the Commission, these rates are conclusively presumed to be reasonable so far as concerns this Court. The Commission had also fixed certain other lower rates for the transportation for exportation, of the same articles between the same points, with certain safeguards to insure that actual exportation is carried out. For like reason, those rates are also conclusively presumed to be reasonable as to amounts and as to the stated conditions upon which they are to be applied. The articles involved herein were not exported, but were shipped to other domestic storage points. They never acquired an export status. Hence the export rates cannot be applied.

2. The fact that the shipper of the articles involved, at the time the shipments were made, intended in good faith that they be exported to Rangoon, Burma, for ultimate delivery to the Republic of China, and that such exportation may have been prevented or delayed by the fall of Rangoon to the Japanese Army, on March 8, 1942, is not a controlling factor, and does not, under the governing tariffs, make the export rates applicable. Under the circumstances shown the

domestic rates are applicable and must be enforced by this Court.

(S) STERLING HUTCHESON,
United States District Judge.

Date: February 12, 1954.

* * * * *

5. OPINION OF THE COURT OF APPEALS IN *United States v. Chesapeake & Ohio Ry. Co.*, 215 F. 2d 213

United States Court of Appeals for the Fourth
Circuit
No. 6808

UNITED STATES OF AMERICA, APPELLANT
versus

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND

(Argued June 16, 1954. Decided Aug. 14, 1954)

Before PARKER, *Chief Judge*, and DOBIE, *Circuit Judge*, and TIMMERMAN, *District Judge*

Alan S. Rosenthal; Attorney, Department of Justice, (Warren E. Burger, Assistant Attorney General; L. S. Parsons, Jr., U. S. Attorney, and Melvin Richter, Attorney, Department of Justice, on brief) for Appellant, and Meade T. Spicer, Jr., (Walter Leake on brief) for Appellee

PARKER, *Chief Judge.*

This is an appeal from a judgment in the sum of \$2,671.43 in favor of the Chesapeake and Ohio

Railway Company in a suit against the United States under the Tucker Act, 28 U. S. C. A. § 1346, to recover the difference between the domestic freight rate and the export rate on certain shipments of automobile parts made from Pontiac, Michigan, to Newport News, Virginia, between December 10, 1941 and January 9, 1942. The shipments in question consisted of twenty-four carloads of chassis, seat cabs and bodies. They were shipped on government bills of lading which showed that they were intended for export to China by way of Rangoon, Burma. The shipments were made in good faith with the intention that they would be exported, releases for that purpose were properly obtained, and, but for the fall of Rangoon to the Japanese, they would have been exported on one of the vessels comprising the pool which the government was using in the transportation of lend-lease commodities. They were allowed to remain in Newport News, however, until after the fall of Rangoon, when it became impossible to transport them to China by way of that port. The government thereupon had them shipped to storage centers in the United States; and there is no showing that they were exported or that any further effort was made to export them. The railroad company billed the government for the domestic tariff rate on the shipments, which was duly paid. Later, in the year 1945, the general accounting office exercised the statutory right, 49 U. S. C. A. § 66, to deduct from other amounts due the railroad by the government the difference between the domestic tariff rate and the export tariff rate, which was lower; and this ac-

tion was instituted to recover the amount of this deduction.

The tariff rates filed by the railroad with the Interstate Commerce Commission provide a lower rate for export shipments than for domestic shipments, but only for export shipments which do not leave the possession of the carrier until delivered to the vessel which is to transport them or on which proof of exportation is given. Provision 23,030 of Central Freight Tariff No. 218-M, which is on file with the Interstate Commerce Commission and applies to the shipments in question is as follows:

The rates named in this tariff, or as same may be amended, and designated as "Export Rates" will apply only on traffic which does not leave the possession of the carrier, delivered by the Atlantic Port Terminal carriers direct to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of export rates; and also on traffic delivered to the party entitled to receive it at the carriers' seaboard stations to which export rates apply, which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation is given.

The question in the case is whether the domestic rate or the export rate applies to the shipments in question. The District Judge held that the good faith intention of the government, at the time the shipments were started, was not a controlling factor; that the fact that there was in effect and on file with the Interstate Commerce

Commission, a certain rate for the transportation for purely domestic shipments moving from Pontiac, Michigan, to Newport News, Virginia, and another rate for export shipments initially moving between those two points, "determined" the reasonableness of both rates; that the tariff requirement for actual proof of exportation for application of the export rate, was a reasonable safeguard "to insure that actual exportation is carried out," and that the shipments involved in this case did not ever acquire or reach export status. With respect to the lack of evidence of any effort to export the shipments, the judge said:

* * * there is no showing here that the government made any effort to ship these pieces of equipment anywhere except to Rangoon, and, in fact, made no effort to ship them to Rangoon, so far as the record shows. It is not in evidence in this case, but I think the court can take judicial notice that at the time lend-lease material of nearly every conceivable description, from cod liver oil and orange juice to mining equipment and railroad rolling stock, were being shipped to forty-odd nations of the world. I think I can take judicial notice of that fact because of the record of another case in this court. And no effort was made here to ship this equipment anywhere abroad and it was simply sent into storage.

We think the trial judge was clearly correct in holding that the domestic rate and not the export rate was the one here applicable. Unquestionably there was an intention to export the goods to China when the goods moved from Pontiac, Michigan; but it is equally clear that this intention

was abandoned after the fall of Rangoon and that what began as a movement in foreign commerce was converted into one which ended in this country and to which the domestic rates applied. We do not mean to say that the export rates would not apply if there had been a frustration of the enterprise from matters beyond the control of the shipper, as would be the case if the goods had been destroyed or seized by the public enemy before exportation. Here, however, the government was exporting goods of the sort involved to countries all over the world, and the fall of Rangoon did not prevent exportation to countries other than China. When the government voluntarily converted what had started out as an export shipment into a domestic shipment, there is no reason why it should not pay the domestic rate.

The government relies upon decisions of the Interstate Commerce Commission, of which *C. B. Fox Co. v. Gulf, Mobile and Ohio R. Co.*, 246 I. C. C. 561 and *Products-From-Sweden, Inc. v. Lehigh Valley R. Co.*, 263 I. C. C. 760, are typical, holding in reparation proceedings that the domestic rate should be held unreasonable and the export rate applied where because of conditions over which the shipper has no control the attempt to export the goods was frustrated. In those cases, however, it appeared that the shipper's ability to export the commodities was completely ended¹ by causes over which it had no control, not, as here, that the shipper abandoned the intention to export

¹ In the *Products-From-Sweden* case the goods were eventually exported.

because one export channel was closed, when others were open, and thus voluntarily converted a movement which had begun as one for the export of goods to one in domestic commerce. Furthermore, while the Interstate Commerce Commission may pass upon the reasonableness of rates, the courts may not do so, but must apply the rates which the Commission has approved. *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 33 S. Ct. 916, 57 L. Ed. 1472; *Baldwin v. Scott County Milling Co.*, 307 U. S. 478, 481, 59 S. Ct. 943, 83 L. Ed. 1409. The question here, as in the court below, is not the reasonableness of the rates, but which rate is applicable to the shipment.

The government contends that the court below should have stayed the proceedings and referred the case to the Interstate Commerce Commission for an adjudication of the reasonableness of the domestic rate as applied to these shipments under the circumstances here appearing. It is a sufficient answer to this that no such action was asked of the court below but that, on the contrary, the stipulation of counsel on which the case was heard provided for judgment in accordance with a finding by the court as to whether proof of actual exportation was or was not required as a condition to the applicability of the export rate. "The rule is well settled that only in exceptional cases will questions, of whatever nature, not raised and properly preserved for review in the trial court, be noticed on appeal." *Hutchinson v. Fidelity Inv. Ass'n*, 4 Cir., 106 F. 2d 431, 436;

Blair v. Oesterlein Machine Co., 275 U. S. 220, 225, 48 S. Ct. 87, 72 L. Ed. 249; 3 Am. Jur., p. 25 et seq. The contention is without merit in any event. Whether the District Court would have stayed proceedings to the end that the question of reasonableness of rates might be passed upon by the Commission would have been a matter resting in its sound discretion and no court would reasonably have exercised the discretion when both parties were barred by limitations from asking the Commission for relief. Furthermore, if the matter could be brought before the Commission, there is no ground for thinking that the Commission would have held the domestic rate unreasonable and the export rate reasonable when the government could have exported the commodities to countries other than China and, instead of doing so, voluntarily converted an export into a domestic shipment.²

² See *Hanlon-Buchanan v. Burlington Rock Island R. Co.*, 258 I. C. C. 519, affirmed, 263 I. C. C. 603; *California Texas Oil Co. v. Bessemer & Lake Erie R. Co.*, 264 I. C. C. 147; *Pacific Chemical & Fertilizer Co. v. Penn. R. Co.*, 268 I. C. C. 468; and *American Republics Corp. v. Wichita Falls & S. R. Co.*, 259 I. C. C. 605.